Q&A: Amendment 2

May 1993

What is Amendment 2?

On November 3, 1992, 53.4 percent of Colorado's voters passed an initiative sponsored by Colorado for Family Values that appeared on the ballot as "Amendment 2." The initiative amends the Constitution of the State of Colorado by adding a new section, section 30(b), to Article II in the Colorado Bill of Rights.

What is the wording of Amendment 2?

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION.

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

What does Amendment 2 do?

Amendment 2 makes it legal and constitutional to discriminate against men and women who are—or who are thought to be—homosexual or bisexual.

How does Amendment 2 make it legal and constitutional to discriminate against gay men, lesbians and bisexuals?

It repeals existing ordinances and policies in Colorado that protect gay men, lesbians and bisexuals from discrimination in housing, employment and public accommodations on the basis of their sexual orientation. It prohibits the passage of similar state or local government anti-discrimination laws in the future. And it prevents all governmental bodies from considering anyone's claim that sexual orientation discrimination has occurred or is illegal.

What is sexual orientation?

Sexual orientation is a person's sexuality, which is a fundamental and basic part of every human being. Sexual orientation is commonly viewed as having two aspects: physical preference and affectional preference. Physical preference is a person's inclination toward female or male sexual partners. Affectional preference is a person's inclination toward female or male emotional partners.

What counties voted against Amendment 2?

Boulder, Clear Creek, Costilla, Denver, Eagle, Garfield, Gilpin, Gunnison, Hinsdale, La Plata, Pitkin, Routt, San Juan, San Miguel and Summit.

What's happened to Amendment 2 so far?

A challenge to the amendment was filed in State District Court in Denver on November 12. The lawsuit claims that Amendment 2 violates the First and Fourteenth Amendments to the U.S. Constitution and Article II of the Colorado Constitution, which is the State's bill of rights. The trial on the challenge will begin in mid-October. The amendment was scheduled to take effect on January 15, 1993. However, a motion for a preliminary injunction was filed to keep the amendment from being enforced until the court decides on its legality. After three-and-a-half days of testimony, Denver District Court Judge Jeffrey Bayless granted the injunction on January 15. The State appealed Judge Bayless's order to the Colorado Supreme Court on January 19, 1993. The Court set May 24, 1993, as the date for oral argument in the appeal.

Why did Judge Bayless grant the injunction?

In his decision, Judge Bayless said there was a reasonable probability that the plaintiffs will be able to prove at the trial that Amendment 2 is unconstitutional beyond a reasonable doubt.

Amendment 2 makes it *legal* and *constitutional* to discriminate against men and women who are—*or who are thought to be*—homosexual or bisexual.

Why does Judge Bayless think the plaintiffs may be able to prove Amendment 2 is unconstitutional?

The Equal Protection clause of the U.S. Constitution's Fourteenth Amendment guarantees that people will be treated similarly—unless there is a sufficient reason to treat them otherwise. Judge Bayless ruled

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that Amendment 2 singles out gays, lesbians and bisexuals and interferes with their fundamental right to participate in the political system. He ruled that while the State may not be able to control private prejudices, it also could not encourage them—which is what Amendment 2 does. The judge held that the State would have to show it had a compelling interest in promoting discrimination to justify that sort of unequal treatment. This is the principle of "strict scrutiny." Since even the State admitted it could not make that showing, the judge ruled that there was a reasonable probability that the plaintiffs would defeat Amendment 2 at the trial. Therefore, the law should not go into effect beforehand.

What is a fundamental right?

The U.S. Supreme Court determines fundamental rights through the decisions it makes on the cases it hears. For example, the Court has labeled the rights of citizens to seek help through the court or legislative systems as fundamental rights. In America, fundamental rights take precedence.

How could Amendment 2 be unconstitutional if a majority of Coloradans voted for it?

Because America is a **constitutional democracy**. Our form of government protects the fundamental individual rights guaranteed to every citizen under the U.S. Constitution. It protects citizens from the "tyranny of the majority" and the abuses of an occasionally overzealous government. If a majority of Colorado voters approved a ballot initiative to establish slavery in our state, or decided to take the vote away from women, for example, those initiatives would be declared unconstitutional because they violate fundamental rights guaranteed in the U.S. Constitution. It would not matter how many people voted for them.

How could Amendment 2 get on the ballot in the first place if it's unconstitutional?

Colorado voters have the right to initiate or change legislation. Therefore, the laws in our state make it relatively easy to put an issue on the ballot. For the most part, initiative sponsors just have to get enough voters to sign their petitions.

Could we have stopped the amendment from going on the ballot in the first place?

Probably not. Historically, the Colorado Supreme Court tends to avoid pre-election challenges to proposed ballot initiatives. In Colorado, the Court generally reviews the legality of legislation after the legislation has been adopted. The court practices this "judicial restraint" because of the constitutional principles of the separation of powers.

What constitutional rights are violated by Amendment 2?

Among others, Amendment 2 violates the right of **equal protection** under the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and the **Due Process Clause** of the Colorado Constitution, **freedom of association** and **freedom of expression** as guaranteed under the First Amendment to the U.S. Constitution and Article II of the Colorado Constitution and the **establishment clause** and the **petition clause** of the First Amendment to the U.S. Constitution.

How does Amendment 2 deprive gay men, lesbians and bisexuals of their Fourteenth Amendment right to equal protection?

Amendment 2 forbids Colorado courts to enforce any local, state or federal laws, statutes or provisions that recognize or protect gay men, lesbians or bisexuals, which is a denial of equal protection. The amendment establishes and encourages a public and private right to discriminate against a specific group of people. It violates the fundamental right of a particular group of Americans to participate in the political process and to seek legislative change, executive action or judicial rulings to improve their position. Only gay men, lesbians and bisexuals are treated in this way. No other group suffers from this special burden.

How does Amendment 2 deny gay men, lesbians and bisexuals their First Amendment and State Constitution rights of freedom of association and expression?

The amendment discourages people from being politically active and discussing their views about sexual orientation, advocating for equal rights for homosexuals and bisexuals or associating with homosexuals and bisexuals. It forces people to accept a single, state-approved belief about sexual orientation and chills free speech about homosexual and bisexual orientation. The amendment also permits discrimination against people who are even perceived to be homosexual or bisexual.

How does Amendment 2 violate the establishment clause of the First Amendment?

One of the provisions of the First Amendment to the U.S. Constitution protects freedom of religion. Called the "establishment clause," it prohibits the government from establishing or promoting any particular religion over another. Amendment 2, however, represents a specific religious view about homosexuality and bisexuality,

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Why did Colorado for Family Values put Amendment 2 on the ballot?

They say they were responding to efforts to pass an anti-discrimination ordinance in Colorado Springs. Because of their religious views, the members of CFV consider homosexuality an "abomination." They believe heterosexuality is the only "correct" sexual orientation. They believe "sexual orientation is not an appropriate criterion for civil rights."

Does the amendment also deny fundamental rights to gay men, lesbians and bisexuals even if they are celibate or maintain opposite sex relationships?

Yes.

Who are the plaintiffs in the lawsuit?

Nine Colorado citizens, the cities of Boulder, Aspen and Denver and the Boulder Valley School District. The citizens are gay men, lesbians, and a heterosexual man living with AIDS. They include tennis player Martina Navratilova, a police officer, an ordained minister and city and state employees.

Why are Boulder, Denver and Aspen plaintiffs in the lawsuit?

Under home rule, the elected officials of these cities passed ordinances that eliminate discrimination in housing, employment and public accommodations because of sexual orientation, age, marital status, gender, family responsibility, disability and other criteria. Amendment 2 repeals homosexual and bisexual status from those ordinances. Boulder, Aspen and Denver claim their home rule rights have been violated.

A religious organization cannot be forced to hire or accept anyone who violates its religious beliefs. This exemption is guaranteed under the First Amendment of the Bill of Rights.

What is home rule?

Home rule is the power given to certain cities by the Colorado State Constitution to control their own government and take care of their own residents. Two-thirds of Coloradans live in home-rule cities.

How can Amendment 2 be overturned?

In one of two ways. It could be repealed or superseded in a general election. Or the court may find it to be unconstitutional.

Why are Governor Romer and Attorney General Gale Norton the defendants in the lawsuit?

Because they are the official representatives of the State. Regardless of their personal opinions, they are required to be included in the case.

What's next? Will the lawsuit go to the U.S. Supreme Court?

We don't know. The Court set May 24, 1993, as the date to begin hearing arguments about the injunction. The trial on the complaint is set to come before Judge Bayless in mid-October. However, whether the trial in the fall takes place depends on the Colorado Supreme Court decision. The side that loses can be expected to appeal. The case could be taken to the U.S. Supreme Court.

Who are some of the local attorneys in the lawsuit?

Jean E. Dubofsky, the lead attorney for the lawsuit, is a former Colorado Supreme Court Justice and a past member of the ACLU of Colorado Board of Directors. **David H. Miller** is the Legal Director of the ACLU of Colorado and the past chair of the Constitutional Rights Committee of the Colorado Bar Association. **Gregory A. Eurich**, the ACLU cooperating attorney, practices law at Holland & Hart. **Jeannie Winer** is a sole practitioner in Boulder, Colorado, with an emphasis on criminal defense. The attorneys are providing their services *pro bono*, free of charge. The City Attorneys of Boulder, Denver and Aspen are also co-counsels.

What organizations are on the legal team?

The Colorado Legal Initiatives Project (CLIP) organized the litigation. CLIP asked the attorneys, the ACLU of Colorado, the National ACLU Lesbian and Gay Rights Project and the Lambda Legal Defense and Education Fund to represent the plaintiffs.

What other organizations are involved in the lawsuit?

Amicus curiae (friend of the court) briefs are filed by independent people or organizations that are not parties to the lawsuit. However, they feel they have some stake in the outcome of the lawsuit or have some special expertise to provide to the court. More than 40 highly reputable organizations, from the Colorado Bar Association to the National Education Association, have filed *amicus* briefs on behalf of the plaintiffs.

How much is the lawsuit going to cost and who's paying for it?

If the lawsuit goes all the way to the U.S. Supreme Court, the case could cost more than $100,000 over the next two years. Each participating organization covers its own costs, including staff salaries and other overhead expenses. In addition, CLIP has pledged to pay for litigation costs, such as bringing in expert witnesses.

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Because America is a **constitutional democracy**. Our form of government protects the fundamental individual rights guaranteed to every citizen under the U.S. Constitution. It protects citizens from the "tyranny of the majority" and the abuses of an occasionally overzealous government. If a majority of Colorado voters approved a ballot initiative to establish slavery in our state, or decided to take the vote away from women, for example, those initiatives would be declared unconstitutional because they violate fundamental rights guaranteed in the U.S. Constitution. It would not matter how many people voted for them.

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Colorado voters have the right to initiate or change legislation. Therefore, the laws in our state make it relatively easy to put an issue on the ballot. For the most part, initiative sponsors just have to get enough voters to sign their petitions.

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Probably not. Historically, the Colorado Supreme Court tends to avoid pre-election challenges to proposed ballot initiatives. In Colorado, the Court generally reviews the legality of legislation after the legislation has been adopted. The court practices this "judicial restraint" because of the constitutional principles of the separation of powers.

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Amendment 2 forbids Colorado courts to enforce any local, state or federal laws, statutes or provisions that recognize or protect gay men, lesbians or bisexuals, which is a denial of equal protection. The amendment establishes and encourages a public and private right to discriminate against a specific group of people. It violates the fundamental right of a particular group of Americans to participate in the political process and to seek legislative change, executive action or judicial rulings to improve their position. Only gay men, lesbians and bisexuals are treated in this way. No other group suffers from this special burden.

How does Amendment 2 deny gay men, lesbians and bisexuals their First Amendment and State Constitution rights of freedom of association and expression?
The amendment discourages people from being politically active and discussing their views about sexual orientation, advocating for equal rights for homosexuals and bisexuals or associating with homosexuals and bisexuals. It forces people to accept a single, state-approved belief about sexual orientation and chills free speech about homosexual and bisexual orientation. The amendment also permits discrimination against people who are even perceived to be homosexual or bisexual.

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advances that particular religious belief and creates legislation with no secular purpose.

How does Amendment 2 violate the right to petition as guaranteed under the First Amendment?

Gay men, lesbians and bisexuals are denied their fundamental right to petition their government for a redress of grievances. Under Amendment 2, people who believe they have been discriminated against because of homosexual or bisexual orientation—actual or perceived—are not allowed to seek help from the courts or any form of government in Colorado. This is a violation of First Amendment rights.

What are "special rights"?

"Special rights" is a made-up phrase. It does not appear in the amendment and has no specific legal meaning. It is a scare-tactic campaign slogan that was used very successfully by Colorado for Family Values. "Special rights" is an emotionally loaded catch-all phrase that Colorado for Family Values uses to group together "minority status," "quota preferences," "protected status" and "claims of discrimination."

Do gay men, lesbians and bisexuals want "special rights"?

No. There's no such thing as "special rights." Homosexuals and bisexuals simply want to be treated the same as all other American citizens and have the same access to the political process.

Don't gay men, lesbians and bisexuals already have the same rights as everyone else?

No. If they did, there would be no need for anti-discrimination legislation. In fact, under Amendment 2, homosexual and bisexual men and women are specifically denied their fundamental rights to appeal to the court system or seek assistance from the government if they think they were discriminated against solely because of their homosexual or bisexual orientation. Amendment 2 allows people to make claims of discrimination based on heterosexual orientation, but denies that same right to homosexuals and bisexuals.

What is protected status?

If a group of people can prove that it has been subjected to and harmed by historical discrimination, the court or government can grant the group "protected status." Once a group is granted protected status, it becomes illegal to discriminate against that group in the future. The civil rights laws of 1964 protect citizens from discrimination because of gender, religion, national origin or race. Recently, disability and age were added to the protected list. Hearing impaired children, for example, can no longer be denied public school education because of their disability.

Doesn't protected status automatically lead to affirmative action and quotas?

Absolutely not. Again, this is a scare tactic used by the supporters of Amendment 2. Protected status just means it's illegal to discriminate against people in that group because of their status. For example, religion is a protected status. There are no affirmative action or quota programs based on religion.

HOW CAN I HELP?

Complete and mail this coupon—or a photocopy—WITH YOUR CHECKS to the organizations you want to support.

☐ YES! I want to eliminate discrimination and protect the civil rights of all Americans.

Name

Address

City **State** **ZIP**

Phones (day) **(eve)** **Fax**

ACLU of Colorado

815 E. 22nd Ave., Denver CO 80205. (303) 861-2258. Fax: (303) 861-2269

____Here's my check to sign me up as a card-carrying member of the ACLU:
____$20 individual ____$30 couple (Membership in the ACLU is NOT tax deductible)
____Here's my **tax-deductible** contribution to support the education and litigation work of the ACLU of Colorado Foundation:
____$50 ____$100 ____$_____
____Let me know about volunteering.
____Send me ____copies of this **Q&A** at $.10 each. I have enclosed $_____
____Send me ____ information packet(s). I've enclosed $_____
____Without Colorado Supreme Court briefs ___ x $10 = $_____
____With Colorado Supreme Court briefs ___ x $20 = $ _____

Equality Colorado

P.O. Box 300476, Denver CO 80203. (303) 839-5540. Fax: (303) 839-1361

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____$25 ____$50 ____100 ____$_____ (Equality Colorado has applied for 501(c)(3) status. Consult your tax advisor)
____Let me know about volunteering

Speakers Project to End Discrimination

1764 Gilpin St., Denver CO 80218. (303) 333-8388 or (303) 831-8351. Fax: (303) 322-7641.

____Here's my check to help train speakers around the state to combat discrimination and homophobia:
____$25 ____50 ____100 ____$_____ (SPED has applied for 501(c)(3) status. Consult your tax advisor)
____Let me know about volunteering

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However, it is illegal to deny someone a job because of that person's religion.

What is affirmative action anyway?

Affirmative action is a temporary remedy used ONLY to correct a historical pattern of gender or racial discrimination.

What is minority status?

There is no legal meaning to "minority status." It was used by the sponsors of Amendment 2 to pit people against one another.

What are quota preferences?

Under very specific and strict legal circumstances, the court may decide to impose special mandates to help government agencies correct serious discrimination suffered by particular groups in the past. Gay men, lesbians and bisexuals have never sought such a remedy in Colorado.

What's discrimination?

The legal definition of discrimination is extremely precise. Under the law, discrimination is unjust and unequal treatment based solely on a person's membership in a particular class or group.

What's a claim of discrimination?

A legal action in which a person charges he or she was treated unjustly and unequally because of his or her membership in a particular group.

Are gay men, lesbians and bisexuals discriminated against because of their sexual orientation?

Yes. Gay men, lesbians and bisexuals—and men and women who are perceived to be homosexual or bisexual—often face discrimination in hiring and promotions, on-the-job harassment, housing and access to medical and other services. They are often victims of intimidation and assault. These are some of the reasons many homosexuals and bisexuals hide their sexual orientation and remain "in the closet."

Are religious organizations exempt from anti-discrimination laws?

Yes. A religious organization cannot be forced to hire or accept anyone who violates its religious beliefs. This exemption is guaranteed under the First Amendment of the Bill of Rights.

Do I have to hire or rent to a homosexual or bisexual?

No, unless you're in a Colorado community with an anti-discrimination law that includes sexual orientation as a category. Even then, there are exceptions. For example, if you employ 20 or less people or if the rental space is in your own home or duplex, you may be exempt.

Why is the ACLU involved?

The American Civil Liberties Union is dedicated to the protection and extension of civil liberties guaranteed to all Americans under the Constitution. The ACLU opposes Amendment 2 because it strips a specific group of Americans of their fundamental rights simply because of their sexual orientation.

How is the ACLU involved?

The ACLU of Colorado and the national ACLU Lesbian and Gay Rights Project are on the legal team challenging Amendment 2. The ACLU is also deeply involved with the public education effort against Amendment 2.

Why is Equality Colorado involved?

Equality Colorado is dedicated to encouraging tolerance, diversity, community inclusiveness and equal rights for all Coloradans regardless of sexual orientation, to the elimination of prejudice and discrimination and to the defense of human and civil rights.

How is Equality Colorado involved?

Equality Colorado supports, promotes and operates grass-roots outreach, education and research efforts and builds coalitions with other groups under attack.

Why is Speakers Project to End Discrimination involved?

Speakers Project understands that Amendment 2 is only a symptom of discrimination, which is a threat to the ideals upon which America was founded. SPED is devoted to eliminating prejudice and bias, particularly homophobia, through education.

How is Speakers Project to End Discrimination involved?

SPED trains people throughout the state to speak about discrimination and homophobia.

What is Colorado for Family Values?

Colorado for Family Values put Amendment 2 on the ballot. Based in Colorado Springs, Colorado for Family Values is part of a national network of far-right religious and political organizations. These organizations include the Christian Coalition and the National Legal Foundation, both affiliated with Pat Robertson, and Lou Sheldon's Traditional Values Coalition, which is based in Southern California. Other affiliated right-wing groups include Focus on the Family, Concerned Women for America, Summit Ministries and the Eagle Forum.

Under the law, discrimination is unjust and unequal treatment based solely on a person's membership in a particular class or group.

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What else is being done to un-do 2?

We send trained speakers to schools and organizations, put on conferences, hold special events, develop and distribute factsheets and other materials, keep the media informed, give interviews, answer requests for information, conduct opposition research and work cooperatively with many other organizations and citizens. The national ACLU Lesbian and Gay Rights Project has commissioned a briefing book based on the experience in Colorado to help other states fight discrimination.

How do the organizations pay for all this?

Out of our general funds. None of us ask for or receive any government money. Each organization is a separate private non-profit. The ACLU depends on membership dues, contributions and gifts and the proceeds of benefits and special events. Equality Colorado and Speakers Project are totally supported by contributions and grants.

Do the ACLU of Colorado, Equality Colorado and Speakers Project need money?

Are you kidding? Of course. And so do all the other organizations that are working to abolish discrimination.

How else can people help in addition to sending money?

Train to be a speaker, volunteer at the office, help raise money, assist with educational events, write letters, speak up.

What states currently include sexual orientation protection in their civil rights laws?

California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Wisconsin and the District of Columbia.

What states have been targeted by the religious and political right for the next round of anti-gay legislation?

Currently, the far-right is working to pass anti-gay laws similar to Amendment 2 in 12 states: California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Ohio, Oregon and Washington.

What's the position of the ACLU of Colorado, Equality Colorado and Speakers Project on the boycott?

We are neutral. We've decided to focus on litigation and education in our challenge to the amendment. However, the national office of the ACLU and some of the other ACLU affiliates have voted to support the boycott. For more information about the boycott, contact Boycott Colorado, Inc., at (303) 777-0560. Out of Colorado, call 1-(800) 4-BOYCOTT.

How can I get more information about the far-right in Colorado?

Citizens Project monitors the far-right in El Paso County. Reach them at:
P.O. Box 2085
Colorado Springs CO 80901-2085
New phone: (719) 520-9899
New fax: (719) 520-0118
Ask about their newsletter.

Equality Colorado and Speakers Project have good information. Local Unity Coalitions are also good sources.

You can also contact Colorado for Family Values directly at:
228 N. Cascade Ave., #102
Colorado Springs CO 80903
(719) 577-4916 or (719) 548-0458
Fax: (719) 471-1358
Ask about their newsletter, too.

How can I get more information about the lawsuit?

The ACLU of Colorado has a packet of information that includes the complaint, news clips, media releases, trial court briefs and the decisions. It's yours for $10 to cover copying and postage. For $20, we'll send you the packet plus copies of the briefs in the Colorado Supreme Court. ■

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